

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RALPH HARRIS

Claimant

VS.

NEWMANN MEMORIAL COUNTY HOSPITAL

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 147,231

ORDER

ON the 9th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Floyd V. Palmer on November 4, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Andrea S. Lybarger, of Topeka, Kansas. The respondent and insurance carrier appeared by and through their attorney, C. Keith Saylor, of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Diane F. Barger, of Emporia, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether claimant suffered an accidental injury arising out of and in the course of his employment on the date alleged;

- (2) The nature and extent of claimant's disability, and what, if any, compensation is owed to claimant;
- (3) Whether claimant is entitled to future medical expense;
- (4) Whether claimant is entitled to unauthorized medical expense;
- (5) What is the claimant's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and in addition to the stipulations by the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish the award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).

- (1) Claimant has failed to prove by a preponderance of the credible evidence that he suffered personal injury by accident arising out of and in the course of his employment on June 23, 1990, while an employee of respondent.

Claimant, a seven-month employee of Newmann Memorial County Hospital in Emporia, Kansas, alleged he injured his back on June 23, 1990, while bending over picking up dirt. There were no witnesses to this event. Shortly after the alleged incident claimant spoke to the assistant manager of the hospital and advised her he was feeling the effects of an old war wound.

Claimant did not follow standard protocol in reporting this injury to his supervisor. Normally he would have been referred to the emergency room for examination and completion of an incident report. Instead claimant left Newmann Memorial County Hospital and drove to the VA Hospital in Topeka, Kansas.

Claimant advised the VA Hospital that he had injured himself falling in the shower that morning when his leg gave out. The claimant further advised when his leg gave out he fell again at work and fell three times while coming into the VA Hospital. The VA Hospital was not advised of claimant's past history of leg and back complaints.

Claimant was evaluated and/or treated by several doctors including Dr. James Edwards, an Emporia chiropractor; Dr. James N. Glenn, an Emporia orthopedic surgeon; Dr. Lance Malmstrom, a Topeka chiropractor; Dr. Philip L. Baker, a Topeka orthopedic surgeon; Dr. Mahasen DeSilva, and Dr. Harold M. Voth, both psychiatrists in Topeka, Kansas.

The histories provided to the medical providers by the claimant varied tremendously. Some doctors were provided the VA Hospital admissions information while other doctors were denied this information. Claimant continued to deny prior problems even while evidence was introduced showing: 1) a back injury suffered while employed by the City of Emporia, Kansas, in 1984, 2) a disability claim through the VA for hip and leg pain in 1987, 3) allegations of old war injuries in Viet Nam, (even though claimant did not serve in Viet

Nam), and 4) a ten day stay in the psychiatric ward of Newmann Memorial County Hospital in March of 1990, subsequent to a suicide attempt.

The record provided by claimant is both confusing and conflicting. The physical symptoms claimant displayed appeared exaggerated including the use of two canes to ambulate. There also was a lack of objective findings to support numerous subjective complaints and conflicting results during neurological examinations with both Dr. Glenn and Dr. Baker. These, together with claimant's continued refusal to cooperate with the recommended medical care leaves this Appeals Board with no choice but to deny claimant's request for workers compensation benefits.

K.S.A. 44-501(a) states in part:

"If in any employment to which the workmen's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workmen's compensation act. In proceedings under the workmen's compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true," on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991).

The Workers Compensation Appeals Board finds claimant has failed in proving by a preponderance of the credible evidence that he suffered an injury arising out of and in the course of his employment on June 23, 1990.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer dated November 4, 1993, shall be and is affirmed in all respects and that the claimant, Ralph Harris, shall be and is denied any award against Newmann Memorial County Hospital.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

CURTIS, SCHLOETZER, HEDBERG, FOSTER & ASSOCIATES	\$ 1,727.40
Transcript of Regular Hearing, Dated April 24, 1992	
Transcript of Motion Hearing, Dated July 1, 1992	
Deposition of Lance Malmstrom, D.C., Dated May 21, 1992	
Deposition of Mahasen DeSilva, M.D., Dated May 21, 1992	
Deposition of Jeffrey Simmons, Dated May 26, 1992	
Deposition of James Edwards, D.C., Dated June 2, 1992	
APPINO & ACHTEN REPORTING	\$ 1,254.40
Deposition of Danita Rees, Dated June 30, 1992	
Deposition of Laura Johnson, Dated June 30, 1992	
Deposition of Ruby Gentry, Dated July 1, 1992	
Deposition of Sandra Free, Dated July 1, 1992	
Deposition of Harold M. Voth, M.D., Dated August 27, 1992	
Deposition of James Glenn, M.D., Dated September 9, 1992	
Deposition of Philip L. Baker, M.D., Dated September 15, 1992	
NORA LYON & ASSOCIATES	\$ 85.00
Transcript of Motion Hearing, Dated February 11, 1992	
NORA LYON & ASSOCIATES (Correll Reporting)	\$ 312.25
Transcript of Preliminary Hearing, Dated March 26, 1992	

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Andrea S. Lybarger, 700 SW Jackson, Roof Garden Suite, Topeka, Kansas 66603
C. Keith Sayler, P.O. Box 949, Topeka, Kansas 66601-0949
Diane F. Barger, 127 W 6th, Suite B, Emporia, Kansas 66801
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director